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ABSTRACT

Designed to be a general outline and guide for school administrators and board members, this monograph provides a broad overview of State statutes and State and Federal court decisions that affect the use and disposition of school property. The first part of the paper presents typical statutes granting to or withholding from school boards discretion to control school property use or disposition. For the sake of convenience as well as for improved analysis, the paper divides the statutes into three broad categories of community use of school property, general purpose use, and use at board discretion; however, the similarities among these categories become readily apparent. Highlighting trends in recent court decisions and the issues involved, the second part of the monograph covers case analyses and clarification of State statutes in the areas of tort liability, leasing and selling, deed clauses, and constitutional issues. (Author)

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School Property: The Legality of its Use and Disposition

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Besides processing documents and journal articles, the Clearinghouse prepares bibliographies, literature reviews, monographs, and other interpretive research studies on topics in its educational area.

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FOREWORD

This monograph by Philip K. Piele and James R. Forsberg is one of a series of state-of-the-knowledge papers on the legal aspects of school administration. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

Litigation involving use and disposition of school property, the authors remind us, does not constitute a unique area of the law. The legal principles incorporated in statutes and cases in this area are not only common to other administrative concerns—*e.g.*, board discretion relates to many aspects of administrative decision-making—but also involve constitutional issues, such as freedom of speech and due process, which extend to all other areas of the law.

Dr. Piele is an associate professor of educational administration and associate director of the Center for Educational Policy and Management at the University of Oregon. He has served as director of the ERIC Clearinghouse on Educational Management since 1969. He holds a bachelor's degree from Washington State University and master's and doctor's degrees from the University of Oregon.

Among Dr. Piele's publications is a book coauthored with John S. Hall, *Budgets, Bonds, and Ballots: Voting Behavior in School Financial Elections*, published in 1973. He has contributed chapters on school property and use of school facilities to *The Yearbook of School Law* and *Current Trends in School Law*.

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SCHOOL PROPERTY: THE LEGALITY OF ITS USE AND DISPOSITION

PHILIP K. PIELE and JAMES R. FORSBERG

I. INTRODUCTION

This paper provides a broad overview of state statutes and state and federal court decisions affecting the use and disposition of school property. The paper is designed mainly to provide general guidelines and to outline areas of concern for the attention of school administrators and board members. A major purpose is to identify trends in recent court decisions or, where no trends exist, to highlight the issues involved by weighing conflicting court decisions against one another.

The second chapter presents typical statutes granting to or withholding from school boards discretion to control the use of school property. While for the sake of convenience as well as for improved analysis the paper divides the statutes into three broad categories, the similarities among them become readily apparent.

In chapter three, devoted to court cases, the differences between the statutes are shown to diminish even further as a result of interpretations by the courts. Courts often give very restrictive statutes a liberal interpretation so that the end effect is to allow most boards of education broad discretion over the use and disposition of school property.

The subject areas covered by the cases reviewed include the types of uses permitted by courts; the effect of such statutes as California's Civic Center Act; restrictions on board discretion as a result of bond and budget elections; standing to sue; board tort liability to users of the schools after hours; disposition—including leasing, selling, and sale and leaseback; problems of title to property including clauses in deeds and leases; and adverse possession.

The final section of chapter three deals with constitutional issues in the use of school property.

II. CLASSIFICATIONS OF STATE STATUTES

The statutes of nearly every state provide guidelines for controlling use of school property for nonschool purposes. Invariably they designate a body of overseers to execute the statutory pro-

visions. The empowered officials are usually the governing body of a geographical unit within the state—the trustees of county boards of education, members of local school boards, or the like.

Three broad categories emerge from examination of the statutes. The categories reflect, simultaneously, the extent of permissible uses and the authority of the governing bodies with relation to those uses: (1) community use of school property, subject to statutory regulations promulgated by the board; (2) use for general purposes as allowed by boards, and (3) use at board discretion. It is well to note, however, that although differences exist among the three categories of property use, they are by no means mutually exclusive: statutory or regulatory limitations are often common to all three types of uses.

The basis for establishing the first category, community use of school property, is the fact that the use of school property is a public right. This does not preclude the exercise of discretionary authority by the empowered body. However, the language of the statutes in this category indicates an intention to grant the right of use *ab initio*, subject to certain limitations.

California's statute, for example, flatly states:

> There is a civic center at each and every public school building and grounds within the state . . . [1]

Similarly, Hawaii's statute reads:

> All public school facilities and grounds shall be available for general recreational purposes and for public and community group meetings . . . [2]

An additional Hawaiian statute reveals an even stronger indication of legislative intent to grant a right to use:

> . . . fullest freedom shall be given to citizens of the State to use for lawful purposes all public school buildings throughout the State during the hours structures are not in use for strictly educational purposes; provided that the person vested with the proper authority over the building shall issue a permit to the applicant, when the proposed use is shown to be lawful by the applicant.[3]

The foregoing examples are somewhat different from the statute in Florida:

> Trustees of any district may permit use of school build-

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[1] CAL. ED. CODE, 16556.
[2] HAWAII REV. STAT., 298.23.
[3] *Id.*, 2989.24.

ings for any legal assembly or as community play centers or as voting centers . . . [4]

This statute exemplifies the second category, general uses, whose statutes range from specific designations of permissible uses to general statements on use "for any public purpose."

The statutory provisions in the third category, use at board discretion, are distinguishable by their emphasis on official discretionary authority to permit use and to promulgate regulations where use has already been permitted. One example is Colorado's statute, which includes within the enumerated powers of the school board the authority to rent or lease "school property which is temporarily not needed for the purposes authorized by law." The statute grants the school board additional authority to permit community organizations to use school property on conditions approved by the board.[5]

In some states, voters are entitled by law to voice their opinions about uses of school property for other than public school purposes. In Iowa, for example, voters at regular elections are empowered to tell the school board whether school buildings may or may not be used for meetings of public interest.[6] The voters' power in that state is that of vetoing what is otherwise permitted by another statute.[7] Discretionary authority rests with the board of directors. Indiana, on the other hand, requires a petition and a majority vote of the unit of local government before the board of school trustees can exercise its discretionary powers to permit use.[8]

The scope of discretion delegated to these governing bodies differs in kind and in degree, limited by statutory provisions. Where statutes detail requirements or limitations, the board's discretion is presumably limited to determining whether or not specific applications for use are appropriate. Indiana's statute is an example of relatively specific provisions, included among which are evening schools, vacation schools, debating clubs, community centers, gymnasiums, public playgrounds, public baths, and "similar activities and accommodations."[9]

In the case of so-called "subversive activities," however, a different kind of discretionary authority seems to be required. Such authority is called for in instances where a statute prohibits uses to organizations "known or believed to hold views that are in con-

[4] FLA. STAT., 235.02.
[5] COLO. REV. STAT., 123-10-19 (26).
[6] IOWA CODE, 278.1.
[7] *Id.*, 297.9.
[8] IND. STAT., 28-4302.
[9] *Id.*, 28-4301.

flict with the republican form of government as set forth in the United States Constitution."[10] Discretionary authority of this type is necessary where statutory conditions stipulate that a requested use be "beneficial to children and youth, consistent with the program of education of the school district."[11] In these statutes, a preliminary value judgment is implied. The scope of discretion requires that a range of different determinations be made.

III. ANALYSIS OF THE CASES

> They [citizens] may be inclined to look upon the buildings as "their" buildings because they were financed with "their" money. Thus, despite the fact the buildings are constructed for school purposes, various groups often seek the use of school buildings for other than school purposes. Whether and to what extent school buildings may legally be used for non-school purposes have been widely litigated."[12]

Court decisions with regard to the use of school property have tended to "render unto Caesar those things that are Caesar's." In the majority of cases questioning a school board's authority over school property use, the courts have turned to state constitutions and state legislation. On the other hand, cases dealing with the broader constitutional rights, such as freedom of speech and religion, and cases concerning the right to equal protection have moved the courts to study the leading interpretations of the United States Constitution.

The discussion that follows illustrates the variety of statutory interpretations, both state and constitutional, and the variety of statutes themselves. Some of these statutes give broad discretionary powers to boards of education. In these instances, the courts are reluctant to limit this discretion if they lack evidence that the board operated arbitrarily, capriciously, or without any rational basis. The cases that follow, however, show that courts question a board's discretion when they think that a board has gone too far.

Where the statutes are more specific, the courts may interpret them narrowly or find *implied* powers in the statutes.

This examination of cases reviews the types of uses of school property that courts have permitted, discusses the effects of acts

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[10] IOWA CODE, *supra* n. 6.
[11] DEL. CODE, 124.
[12] E. REUTTER & R. R. HAMILTON, THE LAW OF PUBLIC EDUCATION (1970).

designating schools as civic centers, and looks at restrictions on board discretion as a result of bond and budget elections. Also included are cases involving questions of standing to sue and board tort liability to users of the school after hours. The cases involving constitutional issues of freedom of speech, due process of law, equal protection of laws, and freedom of religion are reviewed in the final section.

The cases chosen are respresentative rather than exhaustive. Newton Edwards in *Courts and the Public Schools* has provided a very complete listing and discussion of cases involving use of school property decided prior to 1955.[13]

The most commonly found provisions contain broad, general statements that allow use for civic, social, recreational, and community events. In addition, some states explicitly provide for recreation programs set up by the school districts,[14] some allowing for consolidation of such efforts with municipal entities.[15] California explicitly provides for use of school buildings as childcare centers[16] and for disaster shelters.[17] California also provides for use by student body organizations, free of charge.[18] Florida and Iowa have explicit provisions for use as voting centers,[19] and Georgia's statutes provide for leases to private schools.[20]

These examples show the variety of uses contemplated by the various states. It should be remembered here that an even greater latitude can conceivably come from the discretion vested in governing bodies where statutes are, as is often the case, stated in broad terms.

There are often explicit limitations or prohibitions on permissible uses. These prohibitions against uses by subversive organizations or for purportedly subversive activities are illustrated in the educational codes of California[21] and Iowa.[22] Constitutional prohibitions against aid to churches, or forbidding use of public property for religious purposes (pertinent to most states under study) have been variously applied in cases. These prohibitions are discussed in another section.

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[13]N. EDWARDS, COURTS AND THE PUBLIC SCHOOLS (1955).
[14]ARK. STAT., 19.3601; ARIZ. REV. STAT., 15-452.
[15]KAN. STAT., 14-1038.
[16]CAL. ED. CODE, 16554.5.
[17]*Id.*, 16555.5.
[18]*Id.*, 10701.
[19]FLA. STAT., *supra* n. 4; IOWA CODE, *supra* n. 7.
[20]GEORGIA CODE, 32-809.
[21]CAL. ED. CODE, 16564.
[22]IOWA CODE, *supra* n. 7.

Board Authority and Discretion

An Alabama case, *Board of Education of Blount County v. Phillips,* illustrates a broad interpretation of board authority.[23] The plaintiffs in this case (the superintendent and local taxpayers) tried to enjoin the board of education from constructing a new high school, taking cost figures to court to prove that the board's action was a gross abuse of discretion. The court, however, would not let their case get beyond the complaint stage. Before it even considered the action, the court ordered the plaintiffs to demonstrate that the board's action was "so arbitrary and unreasonable that it shocked the sense of justice." The plaintiffs were further charged to show the board's action was not a "fair and careful decision." The court added that the burden of proof of "abuse of discretion" would be a heavy one. In this case, the court found no reason to doubt that the board acted with the public welfare in mind. A disagreement with a board's decision, the court said, is not grounds for relief.

In a similar case, Maryland taxpayers had also tried to prevent a board from constructing a high school.[24] As in the Alabama case, the court found that the complaint had not stated a cause of action. According to the court, the complaint had not alleged facts that showed the board's actions had exceeded the scope of its statutory authority. The Maryland statutes had granted broad authority and the court held that it could not reverse or even control this discretion.

A Kentucky court used what might be called an "ample basis test" to make a similar determination in *Browning v. Board of Education of Fairview Independent School District.*[25] The school board had found a school location after consultation with the superintendent and various architects and engineers. The plaintiffs who challenged this location cited specific reasons why other sites would be better. The court, however, refused to tamper with board discretion, ruling, instead, that the board's reliance on experts in making its selection provided an ample basis for its decision.

There have been cases where the powers granted to boards of education conflict with those of other public agencies. In California, the City of Taft tried to enforce its building ordinance on a contractor named Hall, who was building a school.[26] Hall re-

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[23]Board of Education of Blount County v. Phillips, 96 So. 2d 96 (Ala. 1956).
[24]Dixon v. Carroll County Board of Education, 217 A.2d 364 (Md. 1966).
[25]Browning v. Board of Education of Fairview Independent School District, 291 S.W.2d 17 (Ky. 1956).
[26]Hall v. City of Taft, 302 P.2d 574 (Cal. 1956).

sisted the enforcement of the ordinance and was vindicated by the court. The court held that since the California State Constitution makes the public school system a statewide concern, legislative enactments take precedence over attempted regulation by local government units.

The issue, according to the court, was whether the state had preempted the field of regulating public school building construction. After examining the statutes, it found that the state had completely occupied the field and there was no room for local regulation.

Because the general question of preemption is a complicated one, interpretations may be expected to vary from court to court. An established pattern or procedure is often followed when determining preemption: the courts generally examine the state constitution first and then look to the statutes.

In examining the statutes, the courts look for any acts by local agencies that are specifically forbidden by statute. The courts generally examine specific grants of powers to school boards, as well. Following this, the courts turn their attention to implied powers.

A Wisconsin case presented another facet of the conflict between the state's power over education and the authority of a local governmental body.[27] The plaintiff in the case, Hartford Union High School District, paid under protest a municipal building permit fee to the defendant, the City of Hartford. The plaintiff contended that the school district was not subject to the local building ordinance and therefore was entitled to recover the fee.

The trial court agreed with the school district. It held that since (1) education is a state function that includes the building of public schools and (2) the state had a building code governing the construction of public buildings, the state had therefore reserved to itself the right to inspect the high school building.

On appeal, the Wisconsin Supreme Court recognized that education is a state function, with the construction and operation of school buildings included in that function. That being the case, the court held, the state could protect the school district by sovereign immunity, if it chose to do so. However, the court said the determinative question was whether the state building code preempted the field. In declining the question, the court held:

> . . . while the state building code is comprehensive, there was no intention on the part of the State to preempt the field and public buildings including public and private

[27]Hartford Union High School v. City of Hartford, 187 N.W.2d 849 (Wis. 1971).

schools must conform thereto and to such local building codes as are not inconsistent therewith. We would think a school district would be anxious to conform to local building codes and to cooperate with local building inspectors for the safety of the public and especially the children who are required to use such buildings. There is no doubt the State of Wisconsin has the constitutional power to prescribe standards regulating school construction and can entirely preempt the field so as to deprive municipalities of any voice in these matters, but it has not done so. Therefore, the school district was properly required to pay a building permit fee and accept the inspection of its addition to the high school.[28]

The reasons for the different outcomes in *Hall* and *Hartford* are not readily apparent. It would appear, however, that the cases turned on an interpretation of the respective state statutes. Both courts found that the statutes were comprehensive, but apparently the Wisconsin court did not feel that the state had completely preempted the field. The Wisconsin court based its decision on "intention." As a practical matter it is difficult to determine where they found this "intention," other than in the language of the statute.

Specific Statutes and Implied Powers

The case of *Lincoln Parish School Board v. Ruston College* gives an example of strict, narrow statutes interpreted broadly.[29] This case involved the question whether a Louisiana board could acquire land by prescription. The court first reviewed the board's broad authority given to it by the Louisiana Legislature. A school board is a corporate body, the court noted, created by the state, with the power to sue and be sued. The Louisiana statutes governing acquisition and disposition of property, however, were quite specific. LSA-REV. STAT. 17:81, for example, says that a school board is vested with the power to "receive land by purchasing or donation." It also has the power to sell, lease, or otherwise dispose of school sites that are not used or needed (LSA-REV. STAT. 17:87.6).

In spite of the specificity of these statutes, the courts did not find them to be all inclusive. Because of this, the court ruled that a board has the implied right to acquire property by prescription. The court reinforced its judgment by pointing to the absence of

[28] *Id.* at 853.
[29] Lincoln Parish School Board v. Ruston College, 162 So. 2d 419 (La. 1964).

statutory or constitutional provisions prohibiting acquisition by prescription.

An old Utah case, *Beard v. Board of Education of North Summit School District*, provides another good example of a court that construed express powers broadly.[30] This example could be classified as a "competition case." Such cases involve charges (usually by some local businessman) that the activities being conducted on school premises are commercial—competing with his enterprise to his detriment—and therefore *ultra vires*, beyond the scope of authority of the board to permit.

The plaintiff in this case was a taxpayer and owner of an opera house. He sought to enjoin the local board from allowing or permitting the North Summit High School building from being used for the holding of:

> . . . public or private dances, shows, dramas, motion picture shows, operas, basketball games, and other kinds of entertainments not connected with or part of the school curriculum or course of study, and for which an admission charge is made.[31]

The court, following the most common procedure in such cases, looked first to the statutes, which declared a civic center to be established at each school "where the citizens of the respective school districts within the State of Utah may engage in supervised recreational activities. . . ."[32] Another section gave the board power:

> to permit public school houses, when not occupied for school purposes, and when the use thereof will not interfere in any way with school purposes, to be used for any purpose that will not interfere with the seating or other furniture or property.[33]

The main user of the school facilities after hours was the student government. After investigation, the court found many of these activities to be part of the educational program. This active student government, however, was charging admission fees for the lectures, concerts, movie shows, and other entertainments presented in the auditorium.

The question for the court was whether these activities were undertaken for a commercial purpose on school property, specifically forbidden by statute.

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[30]Beard v. Board of Education of North Summit School District, 16 P.2d 900 (Utah 1932).
[31]*Id.* at 901.
[32]Laws of Utah, 4551 (1917).
[33]*Id.* 4587 (1923).

The judge chose to take a narrow interpretation of commerce and a broad interpretation of board discretion. He defined commerce as being limited to selling and the exchange or transportation of commodities or persons.

In delivering the court's decision, the judge concluded:

> . . . while the conducting of motion picture shows, dances, and other entertainments, where an admission fee is charged, may have some business aspects, yet, in view of the wording of our statute, we cannot say that the legislature intended by the word "commercial" to exclude all games, dances, baseball, football, basketball, debates, lectures or musical entertainments where a charge is made for admission to such entertainments.[34]

An interesting aspect of the case was that the court, after examining the statutes, found that the student body could not use school trucks to transport students to the functions. The court interpreted the appropriate statute to mean that transportation could be provided only for the specific purposes of compulsory education. Peripheral educational activities were excluded.

Finally, the court warned the board not to go to extremes with its discretion if the additional permitted uses were competing with private entertainment places. The court pointed out, however, that the appropriate remedy was elections and petitions to the board rather than litigation.

Limits on Board Discretion

Limits on board discretion are usually in the form of narrow, specific statutes construed narrowly and specifically. There have been other reasons for limiting board discretion, however, and these usually involve constitutional limits, such as freedom of speech and religion. These cases will be examined in detail later.

One example of a constitutional limit on discretion is a Florida case, where plaintiffs challenged the constitutionality of the granting of temporary use of school buildings to a church, pending construction of its own buildings.[35] The court focused on the temporariness of the use in validating this exercise of board discretion, but indicated that this sort of discretion was subject to close judicial review.

Limits on school board authority are usually defined in terms of the statute that vests authority in it or that describes the circum-

[34]Beard, *supra* n. 30 at 911.

[35]South Estates Baptist Church v. Board of Trustees, School Tax District No. 1, 115 So. 2d 697 (Fla. 1969).

stances or procedure for use. A good example of this is found in *Ellis v. Board of Education of San Francisco Unified School District*,[36] one of the first cases to test California's Civic Center Act (since revised).[37]

The Civic Center Act was similar to that in the Utah case of *Beard, supra*.[38] It set up a civic center in each school in California. The act did not require liability insurance, payment of rent, or costs of maintenance and management.

Ellis challenged a school district's right to charge for expenses that were not common. The case also challenged the district's right to make the user organization take out public liability insurance policies in the district's name. The plaintiffs in this case brought an action in mandamus to force the school district to allow them to hold a public meeting on a Sunday afternoon, without having to pay any expenses and without having to furnish liability insurance.

This same group had previously requested a writ of mandamus to allow them to hold meetings during school hours. The request had been denied.[39] The court had ruled, in agreement with the board, that such meetings would interfere with school activities. Obviously, the request for a Sunday meeting time made that objection impossible in *Ellis*.

In reaching its determination, the San Francisco court looked closely at the California Civic Center Act and found that it was the duty of school districts to grant "free" use of school property for the purposes specified in the act. The court concluded that, if an organization were to take out a public liability policy in the name of a school district, it would essentially be subsidizing the school's maintenance and management costs, since liability presupposes negligent maintenance or management. Furthermore, the court noted that another section of the code required the district to pay all necessary expenses incidental to the use of public school buildings. The court pointed out that this was not limited to such things as janitorial expenses incurred, but would include such items as liability insurance.

In a concurring opinion, a justice observed that allowing a board discretion to make a user pay for liability insurance gave it too much power. With this power, the justice reasoned, a board could

[36]Ellis v. Board of Education of San Francisco Unified School District, 164 P.2d 1 (Cal. 1946).

[37]CAL. ED. CODE, 19431–9.

[38]Beard, *supra* n. 30.

[39]Payroll Guarantee Association, Inc. v. Board of Education of San Francisco Unified School District, 163 P.2d 433 (Cal. 1945).

discriminate against certain organizations by determining who would or would not have to pay the fee.

A San Diego court also limited a school board's power to fix rental charges for use of school property to those charges provided for in the applicable statutes.[40]

Sometimes, the act of taking a case to court serves to clarify disputed issues and establish systems or standards to avoid future confusion. Such a case was *Wilson v. Graves County Board of Education,* where the value of such clarification was perhaps equal to that of the primary ruling on the case.

In this case, a Kentucky statute authorizing a school district to join with the city or county to provide a recreation center was construed to mean the county board of education could not act alone in purchasing a center located in another county.[41] To justify purchasing the center, therefore, the Graves County Board of Education relied on a different statute. This statute established the duty and power of the board to do whatever it deemed necessary for the promotion of health and welfare of public school students.

The court explained that the investigation of possible arbitrariness of vested power was a safeguard against the abuse of reasonable discretion. A useful byproduct of the legal procedures was the development of a set of standards for determining the propriety of establishing a recreation center. Where arbitrary action, unwise expenditure, or an objective alien to the school sphere could be found, the court concluded, the school authority could be found to have exceeded the authority vested in it by the statute. In this case, the court found that the board had acted arbitrarily.

A further limitation with regard to statutes can be seen in two old Iowa cases, where the courts held consistently that the electors of a school district were statutorily empowered to direct the assistant director with regard to use of schoolhouses.

In *Townsend v. Hagen,*[42] a school district taxpayer sought to prevent a school director from permitting the use of schoolhouses for religious worship and Sunday school, even though the local voters had previously authorized such use. The court ruled against the taxpayer.

In a subsequent case, *Davis v. Boget,* taxpayers sought to compel the assistant director to permit use after they had voted to allow

[40]Henry George School of Social Science of San Diego v. San Diego Unified School District, 6 Cal. Rptr. 661 (1960).
[41]Wilson v. Graves County Board of Education, 210 S.W.2d 350 (Ky. 1948).
[42]Townsend v. Hagen, 35 Iowa 194 (1872).

use by the citizenry.[43] The court in *Davis* relied on *Townsend* as precedent for the proposition that directors must follow the will of the electorate in permitting or denying use of school buildings.

Other limits on board authority come from its intrinsic nature. In a tort case, *City of Bessemer v. Smith*, a motor bike operator unsuccessfully sued the City of Bessemer, Alabama, for injuries sustained when he hit a chain suspended across a school driveway.[44] Smith aimed his suit at the city instead of the board of education because the school had dedicated the driveway as a public street. The court acknowledged the city board of education's authority to establish and improve driveways, but ruled that it did not have the authority to dedicate driveways to public use.

Stepping beyond the limits of board discretion may also be costly. In California, the Coachella Valley Junior College District obtained property for a junior college within an airport landing pattern.[45] Although the district knew it was being sued over the location of the college, it spent considerable sums erecting the facilities. Consequently, the plaintiffs brought an action of fraud, alleging that the California Department of Education, the California Aeronautics Commission, and other agencies had declared the site useless and unsafe for school facilities. The judge ruled that the complainant had stated a cause of action and the case could be taken to trial, even though the district had expended considerable sums of money. The judge ruled that the expenditures were made at the district's own risk.

Other Factors Bearing on Legality of Use or Legality of Exercise of Board Discretion

The foregoing discussion has served to indicate the importance of statutory delegation of authority to school officials in determining whether the use of school property for nonschool purposes has been allowed. The following discussion will demonstrate the separate and distinct factors taken into consideration by courts, along with the court's construction of relevant statutes. The different factors, for example, often determine whether or not the officials vested with authority have exercised their power legitimately. The factors are, therefore, policy considerations applied to recurring factual patterns.

An important consideration in determining whether courts will uphold grants or refusals is the nature of the contemplated use.

[43]Davis v. Bogel, 50 Iowa 11 (1878).
[44]City of Bessemer v. Smith, 156 So. 2d 644 (Ala. 1963).
[45]Gogerty v. Coachella Valley Junior College District, 371 P.2d 582 (Cal. 1962).

Theatrical purpose has been deemed a permissible use,[46] as was dancing,[47] where the latter was considered sufficiently recreational to come within the scope of the controlling statute. Similarly, we saw in *Beard* that lectures, musical entertainments, motion picture shows, and other entertainment and activities carried out by the student body were considered extracurricular rather than commercial.[48] Permitting use of an athletic field, however, was deemed unauthorized where professional or semiprofessional baseball games were involved during a school term.[49]

In *Burrow v. Pocahantas School District No. 19*, a statute authorizing uses for community purposes was cited in support of a suit seeking to enjoin the operation of an Arkansas tuition school in addition to regular public school.[50] The court denied the request and permitted the tuition school to continue, disassociating the board from the tuition school because the teachers were allowed to use the buildings and because they were responsible for running the school. In the court's view, the statutory requirement was satisfied by the fact that the teachers were the recipients of the grant of use.

Another important consideration in determining grants or refusals is whether or not damage to school property has been alleged. In an Illinois case, *School Directors v. Toll*, the director's decision to bar use by a specific group was upheld in court when the grounds were damages to the building and furniture.[51] A similar ruling was passed in an Arkansas case, *Boyd v. Mitchell*.[52] In both cases, the decision of the authorities (based on the fact of damages) was upheld despite the fact that the groups in both cases claimed rights to use by virtue of the conveyances involved.

An example of a "competition case" has been given already.[53] In a Kentucky case a plaintiff alleged the invalidity of a lease of land and gymnasium from the Shelby County Board of Education to the Waddy Ruritan Club.[54] The lease was for an indefinite period, with the lessor reserving the right to terminate the lease on two weeks notice. The plaintiff owned a business known as Brown Bluegrass Hall, where he staged professional performances of country and folk music. He claimed that he had spent $16,500 in

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[46]Simmons v. Board of Education, 237 N.W. 700 (N.D. 1931).
[47]McClure v. Board of Education of the City of Visalia, 176 P. 711 (Cal. 1918).
[48]Beard, *supra* n. 30.
[49]Canter v. Lake City Baseball Club, 62 S.E.2d 470 (S.C. 1950).
[50]Burrow v. Pocahantas School District No. 19, 79 S.W.2d 1010 (Ark. 1935).
[51]School Directors v. Toll, 149 Ill. App. 541 (1909).
[52]Boyd v. Mitchell 62 S.W. 61 (1901).
[53]Beard, *supra* n. 30.
[54]Hall v. Shelby County Board of Education, 472 S.W.2d 489 (Ky. 1971).

establishing his business and charged that the Ruritan Club had established a business in the gymnasium in direct competition with him. The plaintiff sought damages, a declaratory judgment holding the same lease illegal, and an injunction preventing the Ruritan Club from using the facilities.

The trial court held that the school board had the authority, under state statutes, to permit the club to use otherwise unoccupied and unused premises. The appeals court affirmed this decision and agreed that the Ruritan Club was a civic organization. It noted that, under the broad powers given to boards of education by statute, a lease to such an organization was permissible, if the board exercised its power and determined that the lease was in the best interests of the community. Significantly, the court also found that the plaintiff had no constitutional right to protection from competition.

A Snohomish County, Washington, case raised the issue of student-run enterprises again.[55] In this case, *Hempel v. School District No. 329 of Snohomish County*, a second-class school district permitted its student body to operate a cafeteria in the school building. The cafeteria, open only during lunch intermission, was financed by the student body and profits went to student extracurricular activities.

The plaintiffs challenged this use on grounds of narrow statutory construction. They maintained that, since state statutes only granted the right to run cafeterias to first-class schools, the legislature had meant to exclude second-class schools from running cafeterias.

The court, first of all, found that boards have not only powers expressly granted, but also those fairly implied. Along with its other powers, the court held, the board could allow students to engage in educational activities. This power was incident to powers granted to conduct general school functions, the court ruled. In the eyes of the court, the running of a cafeteria was merely another educational activity, like athletics or school plays.

Board Authority and Elections

Courts have varied in their interpretations of the amount of freedom school boards should have to deviate from projects approved in elections. Older cases construed the primary purpose of expenditures strictly and held boards to statements made on ballots or brochures.[56] More recent cases have given boards greater latitude.

[55]Hempel v. School District No. 329 of Snohomish County, 59 P.2d 729 (Wash. 1936).
[56]Spencer v. Joint School District No. 6, 15 Kan. 202 (1875).

In *Bates v. Orr*, a 1963 case, a ballot had proposed the consolidation of some Arkansas school districts, naming the proposed site of a new school building for which an option was held.[57] The voters approved the proposals.

After the election, however, the board of the new school district encountered difficulties in obtaining the property for the new school. Because of this, the board eventually changed sites. Taxpayers and property owners sought to force the school board to use the original site.

The court sided with the school district. The matter of a different site would not have affected the original vote on consolidation, the court ruled. The difference in sites was insignificant.

In a 1964 Utah case, the Millard County School District board had published its school bond election notice in a newspaper, according to statutory requirement.[58] The notice stated simply that the funds were to go for "school purposes." At the same time, however, a brochure was published by the board that listed the projects for which the money was to be spent. Most of the funds were to go to building a high school, with residual amounts to be spent for constructing and remodeling grade schools in the districts.

After the election, it became apparent to the board that the high school would cost more than originally anticipated, leaving little or nothing for the elementary schools. The taxpayer/plaintiffs sought to enjoin the expenditure of such a large amount on the high school.

The court refused to grant the injunction, ruling that the statements in the brochure accompanying the statutory notice were not misleading or misrepresentative. Furthermore, according to the court, the statements were not part of the statutory notice. The statutes only called for a notice of general purpose. The court found that:

> . . . it is inherent in the nature of the board's function in managing school district business that it have a broad latitude of discretion in order to carry out its objective of providing the best possible school system in the most efficient and economical way.[59]

In 1901, in *Boyd v. Mitchell*, a school had been built by the district with the aid of public subscriptions.[60] Solicitation literature

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[57] Bates v. Orr, 367 S.W.2d 122 (Ark. 1963).
[58] Ricker v. Board of Education of Millard County School District, 396 P.2d 416 (Utah 1964).
[59] *Id.* at 418.
[60] Boyd, *supra* n. 52.

had stated that the schoolhouse was to be used for the purpose of religious worship. When the board disallowed that use after finding that damage was being caused, the plaintiffs brought suit as trustees for the public, seeking to enjoin the directors from preventing such use.

Relying on the directors' statutory authority to control facilities belonging to the district, the court held that the directors' prohibition of religious worship was within their power. The court ruled immaterial the claim that subscribers made contributions with the understanding that such use would be available. The pamphlets referring to such use also described the directors' power to control and protect the property of the district, the court held.

In a 1914 Arkansas case, the citizens and taxpayers of a school district sought to prevent the school directors from allowing a lodge organization to use school facilities as a lodge hall.[61] The petitioners maintained that a state statute authorized directors to permit only private schools to make use of public school facilities. The court refuted this interpretation of the statutes, ruling that proposed remodeling plans would not interfere with the use of the school for its original purpose. In so finding, the court upheld the exercise of the directors' authority, implicitly denying the petitioners' demand that the voters should first give their approval for such use. General approval for use had previously been acquired by election. Specific approval was deemed unnecessary.

In *Baker v. Unified School District No. 346*, Kansas voters and taxpayers sought in 1971 to prevent a school board from issuing bonds for a school building, though the bonds had been authorized in a legal election.[62] The voters contended that the building was entirely different in construction and size from plans shown to them in brochures prior to the election and for which the bonds were authorized. The trial court dismissed the complaint.

In affirming the trial court's action, the Kansas Supreme Court ruled that the legislature had conferred power (in general terms) on the school district to select a site. Therefore, the board was authorized to acquire, construct, equip, and furnish a school building whenever it determined such actions necessary. According to the supreme court, the board had no funds to pay architects until the bonds were sold. The details of construction could not be finalized, therefore, and the brochure used prior to the election could only be general in nature.

The Kansas Supreme Court cited several cases describing the

[61] Cost v. Shinault, 166 S.W. 740 (Ark. 1914).
[62] Baker v. Unified School District No. 346, 480 P.2d 409 (Kan. 1971).

reluctance of courts to intervene in matters of administrative discretion. After examining the facts of the case, the court held:

> There is no allegation in the present petition of bad faith and no claim of arbitrary, capricious, or unreasonable conduct by the board. No facts are alleged in the petition from which any of these may be inferred. No illegal acts are charged. The purpose for which the bonds were voted still exists, has not been abandoned and there is no change in conditions which might render issuance of the bonds inequitable. In the absence of such allegations the petition fails to state sufficient facts to constitute a justifiable claim.[63]

Standing to Sue

Without ever getting to the central issues of a case, past courts have sometimes questioned a plaintiff's right to bring an action. In some of the older cases, the taxpayer's right to bring action was challenged; two examples illustrate this "old view."

In *Scofield v. Eighth School District,* a taxpayer in a Connecticut school district objected to use of a schoolhouse for religious purposes even though the people had voted to allow such use.[64] The taxpayer contended that the schoolhouse and furniture were being worn out because of the additional use. As a result, the taxpayer charged, he was liable for higher taxation than would otherwise have been the case. The court found this contention unwarranted. The plaintiff did not have school children, and school expenses were only levied on those who did.

The court did, however, give the plaintiff standing in court as a member of a corporation. It based its rationale on the fact that the school was considered corporate property, subject to corporation law. As a corporation, the school could only possess properties specified by its charter and incidental to its existence. Since the incorporated school district was created for the sole purpose of education, its property should only be applied to that purpose, the court reasoned. Therefore, since the school district exceeded its authority by permitting use for a religious purpose, a corporation member who protested such action should be afforded equitable relief. The court granted the taxpayer an injunction preventing such use even though damages to him were slight.

In a Kansas case, however, the court denied that taxpayer status created standing for an individual attempting to enjoin the use of

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[63] *Id.* at 412.
[64] Scofield v. Eighth School District, 27 Conn. 499 (1858).

a schoolhouse for other than school purposes.[65] Only a claimed injury to private property, where the taxpayer's children suffered damages to property left in a schoolroom, was held to enable him to bring action.

A more modern case, *Demers v. Collins*, resulted in a surprisingly narrow view of standing. In this 1964 Rhode Island case, Demers (a seller of musical instruments) charged a school district with a violation of a state law for selling and renting musical instruments on its premises.[66] The applicable statute read in part:

> Excepting the sale of school lunches under rules and regulations prescribed by the school committee of the town or city, no article shall be sold or offered for sale to public school pupils or teachers on any public school premises, nor shall any article be sold through the agency of pupils in public schools.[67]

Demers first followed administrative procedure and received a hearing before the commissioner of education, who found no violation of the law. He appealed to the state board of education, which heard his appeal but upheld the commissioner. When Demers appealed the board's decision to the state supreme court, that court found that the instrument salesman was not an aggrieved person and that he had received more than his share of hearings. The state board was only required to take appeals from aggrieved persons, the supreme court said, and there had been no finding that this plaintiff was aggrieved, adding:

> A grievance supposes a wrong, growing out of some infraction of law, of which the aggrieved party has the right to complain . . . . It is our opinion that standing to invoke the appellate jurisdiction of the commissioner . . . is established only by showing that the decision of the committee of which complaint is made adjudicated some right of the appellant and decided it adversely to him.[68]

Tort Liability

The following cases do not begin to run the gamut of tort law in general, but they provide examples of tort issues that may arise from granting the use of school property.

In *Smith v. Board of Education*,[69] Mrs. Smith, an elderly woman,

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[65] Spencer, *supra* n. 56.
[66] Demers v. Collins, 201 A.2d 477 (R.I. 1964).
[67] GEN. LAWS R. I., 16–38–6 (1956).
[68] Demers, *supra* n. 66 at 480.
[69] Smith v. Board of Education, 464 P.2d 571 (Kan. 1970).

fell down some unlighted steps on her way to a community center room. The incident took place in the basement of a high school building in Caney, Kansas. She sued the board of education collectively, its members individually, the superintendent of schools, and the caretaker/janitor for her injuries. Her claim for damages was based on the contention that the janitor and the superintendent had failed to have the stairway lighted. Mrs. Smith claimed that such negligence was attributable to the board of education and its individual members, since the community center room was being operated by them, making them the room's proprietors, in effect.

At the trial court level, the court dismissed the charges against the board and its members, but allowed the trial of the janitor and superintendent to continue. The jury found these defendants also not guilty.

Mrs. Smith appealed the case, taking issue with the trial court's ruling that the board members had been engaged in a governmental function, subject to immunity from tort actions.

The appeals court was forced to determine whether permissive use of a building was a governmental function. The court went immediately to the statute authorizing boards of education to permit use of school buildings for community purposes. The court noted, however, that the statute simply indicated that the school board was acting with statutory authority. The statute did not, however, determine the question before the court, since governmental functions may be either mandatory *or* permissive.

The court then sought the answer in cases that had tried to define proprietary functions. The courts, in these cases, had noted first that each case must be governed by its own particular facts. One definition held that it is proprietary action when a state (or one of its corporate creations) runs an enterprise that is either commercial in nature or is usually carried on by private individuals or private companies. Another rule described any activity in a private capacity for the benefit of a city, governmental agency, or the people who compose it (rather than for the public at large) as "competition." Under this rule, any agency engaged in such an activity could be ruled in competition with private enterprise and accountable for the torts of its employees.

The plaintiff in this case argued that a $3 charge for the use of the community room made the activity commercial because it added to profits that had accrued above the expenses necessary to maintain the room. The court conceded that a substantial amount had

accrued in the community room fund, but found the argument unconvincing:

> We must not place a too narrow restriction on the use of school buildings. They are occupied little enough during the course of a year. School buildings are maintained for educational purposes. Education embraces either mental, moral or physical powers and facilities. Education is not limited to children. The middle aged or the aged may also benefit. We would not say that a school board encouraging, or a school building used for, debate societies, musicals, future home makers, home demonstrations, etc., is extending activities beyond those anticipated in our schools and educational system insofar as the activities do not interfere with the usual educational program and are not commercial in nature.[10]

The use of the building, the judge concluded, was a governmental function.

Having disposed of that issue, the court turned to the plaintiff's next contention: that the board had waived immunity by taking out liability insurance. The court was again unconvinced. It held that only the legislature has the authority to waive immunity. Therefore, the court said, there must be an express statutory waiver before state agencies, operating in a governmental capacity, may be subject to suit. Furthermore, immunity is never waived or surrendered by inference or implication. Governmental agencies cannot do indirectly what they are not permitted to do directly, the court said.

The court had now disposed of the claims against the board and its members, but the plaintiff still maintained that the trial court's instructions to the jury were in error. The trial judge had instructed the jury that the plaintiff had been a licensee and, consequently, the only duty owed to Mrs. Smith by the superintendent and the janitor was to refrain from willfully, wantonly, and recklessly injuring her. Mrs. Smith maintained that she had been invited and, therefore, she was owed a much higher degree of care from the defendants. The court agreed that invitees are owed a much higher degree of care, but it did not agree that Mrs. Smith was an invitee. The court determined that a person is an invitee if he goes to the premises of another "at the express or implied invitation of the owner and for their mutual advantage." The court refused to consider the $3.00 to be of any benefit to the owner and noted:

Regardless of how designated, the transaction does not rise

[10] *Id.* at 575.

to the dignity of a rental, creating the relationship of landlord and tenant.

We can see nothing in the transaction other than a permissive use of the community room on the payment of $3.00 to reimburse the school district for the costs mentioned above. The use being permissive and of no special benefit to the school district the appellant was a mere licensee.[71]

State governmental structure may sometimes be used to determine tort liability. In Massachusetts a case arose in 1941 concerning use of school buildings by a fraternal organization. A school committee had established regulations authorizing the superintendent to rent the school halls and gymnasium. Accordingly, the superintendent rented the school facilities to a fraternal lodge. A member of the lodge, a man named Warburton, was injured in some undisclosed manner. Warburton sued the City of Quincy because the city treasurer had accepted the lodge organization's check and endorsed it over to the committee.[72] This action, the plaintiff contended, made the committee "agents of the city" and therefore the city was liable.

"Not so!" said the court, after examining the city charter to determine the governmental structure. The committee members were public officials acting on their own under state regulations, the court ruled, and were not agents of the city.

In a New York case, a boy was walking along a public sidewalk and fell down a coal shaft, which abutted the sidewalk. The shaft was on school property and the sidewalk was the responsibility of the city. In the ensuing suit for injuries suffered by the boy, *(Lessin v. Board of Education of City of New York),* the court found that both the city and school board were liable for maintaining the shaft in a safe condition, specifically for placing barriers or warning signs around it.[73]

Disposition—Leasing and Selling

Many of the same principles that apply to board authority in other areas of school management also apply to its discretion to lease or sell property. Courts often look first to the statutes for limits on board authority. As we have seen in other areas, the courts have tended to broaden their interpretation of the scope of discretion that they will grant to a board.

In an old West Virginia lease case, *Herald v. Board of Education,*

[71] *Id.* at 577.
[72] Warburton v. City of Quincy, 34 N.E.2d 661 (Mass. 1941).
[73] Lessin v. Board of Education of City of New York, 161 E. 160 (1928).

the school district leased property to two individuals for the purpose of oil and gas production for one year and as long after that as gas or oil should be produced.[74] The court invalidated the lease in 1909, explaining that a school board is not a profit-making business corporation.

The board, according to the court, is a quasi-public corporation. This quasi-public entity exists only under statute, having only the express powers given by statute and such powers as were absolutely necessary to exercise those express powers, the court said. By statute the board's revenues were to come from taxation. By implication, however, the court hinted that a sale would be permissible, if the funds were to go to buildings. On the other hand, however, a lease or partial sale was not allowed.

A Louisiana court voiced concern over a board's ability to control the use of leased property. In this case, the Vernon Parish Board of Education leased part of school property to an individual so that he could erect a cafeteria catering to school staff and students.[75] The lease was for a term of ten years but contained no controls restricting the lessee's use of the property. The lessee actually intended to lease the land for the purpose of running a cafeteria, but the lease did not limit him to the specific use.

As a result, the court nullified the lease. The court's ruling was based on the school board's loss of control over the use of the property. The court observed that if the use had been merely permissive, not for a set period of time, and not in an unconditional lease, the lease of property might have been acceptable. According to the court, the school could only lease property for some casual use, not prejudicial to nor inconsistent with the main purpose for which the property was acquired.

In an Arizona case, the board not only did not profit from the lease, but it seemed to make a gift of the lease.[76] In February 1931, Prescott School District No. 1, of Yavapai County in Arizona, leased one of its schools to the Prescott Community Hospital. The lease was for five years at an annual rate of one dollar. Prescott Community Hospital also had the right to renew indefinitely, in increments of five years. Probably in disbelief at the unusual lease, the hospital filed for a declaratory judgment determining the validity of the lease.

The judges found that this was, in substance, a gift rather than

[74]Herald v. Board of Education, 65 S.E. 102 (W. Va. 1909).
[75]Presley v. Vernon Parish Board of Education, 139 So. 692 (La. 1932).
[76]Prescott Community Hospital Commission v. Prescott School District No. 1 of Yavapai County, 115 P.2d 160 (Ariz. 1941).

a lease. They conceded that it was for a very worthy cause, but also ruled that it was entirely out of the scope of authority of the board. The court ruled:

> School districts are created by the State for the sole purpose of promoting the education of the youth of the State. All their powers are given to them and all the property which they own is held by them in trust for the same purpose, and any contract of any nature which they may enter into, which shows on its face that it is not meant for the educational advancement of the youth of the district, but for some other purpose, no matter how worthy in its notion, is *ultra vires* and void.[17]

In an unusual Kansas case, certain persons had contributed money and labor to build an annex to the schoolhouse in Wyandotte County. This addition was used as a clubroom and a stage for recitals.[18]

When the annex was completed, the school increased its fire insurance coverage to include the annex. The school subsequently burned down and the persons who had built the annex sued for their share of the insurance money in *Blankenship v. Wyandotte County School District No. 28.* The court ruled against the plaintiffs, saying that it was beyond the school board's authority to make a binding agreement that the annex would be the property of the plaintiffs after it was completed. Therefore, the court ruled, the property belonged to the board and it alone was entitled to the insurance proceeds.

Courts also give broad latitude to boards in the ultimate disposition of property-selling. A case in point is that of *Blair v. City of Fargo*, heard in 1969. In Fargo, North Dakota, a school board, after being advised that an old school was beyond renovation, also determined that the school was in an area of dwindling student population.[19] The board finally decided to sell the school building.

Taxpayers challenged this move, arguing first that, since the title to the school property was vested in the City of Fargo, the board lacked the authority to sell the property. The court, after looking at the statutes that set up the Fargo board, disagreed.

Under those statutes, the board had the power to purchase, sell, exchange, and lease school buildings for school purposes. The plaintiff contended that the sale of the property to the county was not for "school purposes." The court ruled ultimately that this in-

[17] *Id.* at 161.
[18] Blankenship v. School District No. 28 of Wyandotte County, 15 P.2d 438 (Kan. 1932).
[19] Blair v. City of Fargo, 171 N.W.2d (N.D. 1969).

terpretation was "unreasonable" because it would block any disposition of old, useless property.

A Manitowoc, Wisconsin, case involved a 1930 controversy over whether the city or the board of education could control the disposition of school buildings.[80]

The Manitowoc Board of Education had turned over one of its buildings to the local board of vocational education. The council of the City of Manitowoc argued that the city was the sole organization that could determine the use to which the school building could be put.

The court disagreed, finding that state statutes legally empowered boards of education to possess, maintain, control, and manage school property. Furthermore, in setting up local boards of vocational education, state statutes had required that existing school buildings be used as far as practicable. The court concluded that the boards had acted within their legal authority and ruled that the city council had no legal say in the matter.

Conveyance-Leaseback and Lease Purchase

The recent dilemma faced by school boards in obtaining funds for school building construction is well known. This familiar crisis, caused by repeated rejection of school bond issues, has caused board members to turn to other methods of obtaining school buildings. One of the more popular methods has been conveyance and leaseback, a method that has been sanctioned by state legislation.

In a complicated case involving the constitutionality of the Illinois Public Building Commission Act, the Illinois Supreme Court was called on to determine whether a proposed construction program of the Chicago Board of Education, under the act, violated the school code.[81]

The act provided that several municipal corporations that had joined in the organization of a public building commission could donate their property to the commission. Further, under the act, they could convey the property to the commission with a "reverter" clause that described the reversion of the property to the transferor when all revenue bonds had been paid off. The Illinois Public Building Commission Act also provided that the commission could erect buildings on the property and rent them to public agencies

[80] City of Manitowoc v. Board of Education of City of Manitowoc, 229 N.W. 652 (Wis. 1930).

[81] People *ex. rel.* Stamos v. Public Building Commission of Chicago, 238 N.E.2d 390 (Ill. 1968).

for periods of up to twenty years, provided the lessees bore the maintenance costs.

The court looked to see if this act could be reconciled with the school code. In giving powers to the Chicago board, the school code did not make those powers exclusive, the court said. The board could exercise all other proper, necessary powers for the maintenance and development of school systems, provided they did not conflict with powers outlined in the school code that applied to other school districts.

The court noted that the code allowed other school districts to lease administrative space from public building commissions. Therefore, the court ruled that the code allowed the Chicago board to avail itself of the Public Building Commission Act.

A case in Iowa concerned what might be called lease and leaseback.[82] This case centered around a very crowded community school's search for additional space. Classes were being held in the lunchroom, garage, boiler room, and gymnasium.

The board of the school was faced with three alternatives: consolidation, paying tuition for high school students who would be sent to other districts, or building additional space. They chose the latter and held four bond elections between 1960 and 1964 to obtain funds for the building of additional facilities. None of the issues passed by the required 60 percent. Consequently, the board entered into three written agreements with a corporation.

The first agreement leased land adjacent to the school to the corporation for $25 an acre. In the second instrument, the corporation leased twelve movable building-sections—the components for seven additional classrooms—to the school for a period of five years, at an annual rent of $21,912. All the classrooms were to be placed under one roof on a single concrete base on the land leased from the district. This instrument also contained an option to renew the rental, at $10,956 a year. The third agreement was an option giving the district the right to purchase the structure for $14,000 at the end of five years.[83]

At this point, there began a series of protestations and deliberations that produced an "on-again, off-again" effect. Residents of the district protested the agreements and appealed the actions to the county superintendent, who did not approve the agreements. When the district appealed this decision to the Iowa State Board of

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[82] Porter v. Iowa State Board of Public Instruction, 144 N.W.2d 920 (Iowa 1966).
[83] *Id.* at 922.

Public Instruction, the board overturned the superintendent's ruling and reinstated the leases.

Taxpayers challenged this decision in court, charging that the state board had exceeded its jurisdiction and therefore acted illegally. The trial and appeals court found that the district had gone considerably beyond its statutory authority. The statute specifically held that a board could only employ a teacher or rent a room when there were ten children without a schoolhouse.[84] The appeals court held that the leases attempted to do what the board could not do directly, since the voters had refused four times to authorize bond issues.

A 1965 statute, passed too late to help the school district in this case, provided that a district could make twenty-year time contracts for the rental of buildings to supplement existing facilities. This authority included the power to make lease purchase agreements. Under the statute, authority to engage in any of these actions rested on the approval of 60 per cent of the voters.

In a Kentucky case, the City of Bowling Green and the Bowling Green Independent School District tested the legality of a conveyance-leaseback arrangement.[85] The court examined the Kentucky statutes and found that it was legal for the school to convey and leaseback. In addition, the court held, it could do this regardless of the financing of the construction. (In this case, the city had financed the construction with its own bonds.)

Deed Clauses, Abandonment, and Reverter

Courts are often called on to interpret clauses in deeds that originally granted land to school districts. There is an extremely broad variety of both clauses and treatment of these clauses by the courts. The following cases represent some of the situations faced by boards and the reactions of the courts.

Possibly the most common clause in these deeds is a "reverter" clause that causes the property to revert to the grantor, or his successors, when a board of education abandons the property. Courts are often faced with the problem of determining what constitutes abandonment, as in a 1970 North Dakota case, *Ballantyne v. Nedrose Public School District No. 4.*[86]

The defendant school district acquired the property in 1910 by a deed that contained the following clause:

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[84] *Id.* at 924.

[85] City of Bowling Green v. Board of Education of Bowling Green Independent School District, 443 S.W.2d 243 (Ky. 1969).

[86] Ballantyne v. Nedrose Public School District No. 4, 177 N.W.2d 551 (N.D. 1970).

> In the event that should the above described property be abandoned for school purposes at any future time, the title to this property is to revert to T. F. Renwald or his heirs.

The school district had ceased to hold classes on the property ten years prior to the court case, though it continued to use the building for storage of school property. During this time the school district had also leased the property to a church.

Ballantyne, the plaintiff, brought action to give him undisputed title to the property as the holder of quitclaim deeds[87] granted by the heirs of T. F. Renwald. The plaintiff pointed out that the property was no longer being used for school purposes and claimed, therefore, the land had reverted to him.

The trial court found that the property had, indeed, been abandoned for school purposes and agreed that Ballantyne should be given a fee simple title to the property in question. However, on appeal, the Supreme Court of North Dakota ruled:

> We believe that the action of the school board in the case before us in using the old school building for storage of the school district's equipment and supplies evinces an intention to continue to use the school building and land in question for "school purposes" and does not amount to an abandonment so as to invoke the reverter clause in the deed.[88]

In Colorado a court action raised issues of both abandonment and forfeiture of a lease by a school district.[89] The Panuccis, whose predecessors in 1920 had leased land to the school district's predecessor for ninety-nine years, in 1966 asked the court to resolve formally the disputed claims to the property. The original lease carried the following provisions:

> . . . said premises being leased for the purpose of enabling the party of the second part to erect thereupon a public school house and appurtenances, and to use the demised premises for such purposes only. . . . The party of the second part shall not . . . use or permit the premises to be used for any purpose except as a schoolhouse, without the written consent of the party of the first part. A violation of

[87] A quitclaim deed is a deed which operates by way of a release. It is intended to pass any title, interest, or claim which the grantor may have in the premises, but does not profess that such a title is valid or that it contains any warranty or covenants for title. A fee simple absolute title is an estate vested absolutely to the guarantee and his heirs without any limitation or condition.

[88] Ballantyne, *supra* n. 86 at 553.

[89] School District RE-2 (J) v. Panucci, 490 P.2d 711 (Colo. 1971).

> any of the covenants herein contained shall result in a forfeiture of this lease at the option of the party of the first part . . .[90]

By the time the lease was executed, the school district had already constructed an elementary school building where classes were held until 1963. In 1963, however, the school was boarded up when the district was reorganized and absorbed into a larger school district. Controversy whether the building was used for storage between 1963 and 1966 was still raging when suit was brought in 1971.

The courts were asked to determine whether the school district had abandoned or forfeited the property. Both trial and appeals courts agreed that the school had not abandoned the property. The appeals court held that

> . . . abandonment can be found only where there has been proved a clear intent to abandon, and this intent cannot be presumed from or proved solely by the fact of nonuse for a period less than that set by the statute of limitations.[91]

Still left to be decided, however, was whether the lease had been forfeited. The appeals court observed that forfeiture clauses in commercial leases must be strictly construed or a lessee might be unfairly deprived of his investment because of some technicality. In this case, the court noted that the lease was a gift lease and studied the terms to see if conditions for lease termination were present. The court found that the lease "gives no indication that an incidental use of the building for storage only would fulfill the purpose requirement intended or contemplated by the parties." The court concluded:

> . . . although forfeitures are not looked upon with favor, where the default is clearly established under express forfeiture provisions in the lease, lessors are permitted to exercise their power of termination.[92]

On this basis, the court concluded that the school had, in fact, terminated the lease and forfeited the property.

Boutwell v. County Board of Education of Escambia County, an unusual Alabama case, concerned the original grantor of property to a school board. After the grantor had given the property to the board, he regained use of the property for one summer to let a

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[90] *Id.* at 712.
[91] *Id.* at 713.
[92] *Id.* at 714.

minister hold services in the school.[93] The property was then conveyed to the daughter of the grantor, who claimed he was again the owner because of a reverter clause in the original grant to the school.

The court disagreed, ruling that possession had remained in the board of education, even though the original grantor had been given the use of the property for the summer.

Looks are sometimes deceiving with regard to property ownership. Even when a school district may appear to have abandoned a piece of property, it may still hold the title through some other action. This situation occurred in a Kansas case, *Walton v. Unified School District No. 383*,[94] a case brought to court in 1969.

Walton centered around a disputed claim to a property title. As it happened, both the original grantor and the grantee had passed the property along to heirs.

The original property owner's heirs granted use of the land to yet another party. At the same time, the school district had passed along use of the land as well.

The actual case arose when the grantees of the owner's heirs sued the school district's successors in an attempt to acquire the land. When the case was examined by the bench, two pertinent facts were uncovered: (1) The land in question had ceased to be used as a school in 1937, and (2) the action commenced in 1963, twenty-eight years later.

Title to the land was awarded to the school district by the court, by virtue of adverse possession. The court ruled that the determination of adverse possession was a question of fact. That determination, if based on competent evidence, could not be disturbed on appeal, the court said.

The court pointed out that the real owner of the land had to be aware that a claim disputing his ownership was being made. In addition, the court said, any acts constituting adverse possession[95] had to be open and obvious to all persons with claims on the property. These things being done, and with no action by the real owner in twenty-eight years, title to the property was awarded to the "new" claimant on the grounds of adverse possession.

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[93]Boutwell v. County Board of Education of Escambia County, 12 So. 2d 349 (Ala. 1943).

[94]Walton v. Unified School District No. 383, 454 P.2d 469 (Kan. 1969).

[95]Adverse possession is a method of acquisition of title by possession for a statutory period under certain conditions. Some of these conditions may be that the occupant hold the property in an open and notorious manner and that he intend to claim and hold the property in opposition to the real owner and the whole world. Some states require that the occupant also pay taxes on the land.

Disposition of Property to Segregated Private Academies

The opening of numerous white academies following court-ordered desegregation in the late sixties has led to some recent litigation. Some southern school districts leased or sold excess school facilities to these segregated academies and subsequently had these dispositions challenged in court.

In Jefferson County, Alabama, the setting for a great deal of desegregation litigation, the City of Brighton purchased a school building from the county and subsequently leased it to an all-white academy. Plaintiffs challenged this action in a United States district court in an attempt to enjoin the city from leasing the property to the academy.[96] The plaintiffs argued that the lease violated the equal protection clause of the Fourteenth Amendment. After a preliminary hearing, the district court offered its opinion that the lease was indeed probably invalid. The city then sold the school to the academy.

When the plaintiffs challenged this action, the court held that the sale was valid. On appeal, the Fifth Circuit Court of Appeals disagreed:

> The law is settled that no matter how neutral a piece of legislation or official action appears on its face, if its practical effect is to place a burden on one racial group, then such a burden constitutes a denial of equal protection.[97]

The court further noted:

> It has long been settled that when a statute or official action has the effect of discriminating between racial groups it is constitutionally suspect . . . and the State must come forward with a valid and compelling State interest to justify its action.[98]

In this case the court found that the city not only had failed to demonstrate a compelling state interest, but also it had acted in bad faith by selling the building after having been told that leasing the school was probably unconstitutional. The sale was voided.[99]

In a subsequent Mississippi case, a school board claimed it had no knowledge that the persons to whom it had sold property would use it as a segregated academy. The Fifth Circuit Court of Ap-

[96] Wright v. City of Brighton, 441 F.2d 447 (5th Cir. 1971).
[97] *Id.* at 450.
[98] *Id.* at 452.
[99] *See also* Graves v. Board of Education, 465 F.2d 887 (5th Cir. 1972).

peals again invalidated this sale on the same basic grounds as the Alabama case but expanded the scope of that case somewhat.

The board claimed it was not aware that those who purchased the building would practice racial segregation. The court noted, however, that the board was aware of local and statewide movements to avoid desegregation by forming private schools. For this reason, the board was negligent in making no effort to investigate or consider the "patently obvious" possibility that the property might became a segregated academy.[100] The court declared:

> . . . [S]chool boards are charged with the affirmative duty to take whatever steps might be necessary to bring about a unitary educational system which is free from racial discrimination. . . . That duty includes making some sort of reasonable investigation of prospective purchasers when school property is sold in an area where it is common practice to establish all white private schools as a response to court-ordered integration.[101]

The court initially voided the sale. However, after a rehearing, it approved the sale but enjoined the new owner from using the property to operate a segregated school.

A Mississippi federal district court upheld the sale of school board property to a purchaser who disavowed any intention to devote the property to the use of segregated private schools.[102] In this case the purchaser testified he intended to use the property for farming operations, general offices, warehouses, and shops. The court approved the sale on the condition that a reverter clause be placed in the deed to the effect "that should the purchaser or anyone succeeding him violate the covenant by using the property for a racially segregated private school, the title would revert to the grantor."[103]

The Fifth Circuit Court of Appeals also approved a Florida school board's plan to close two elementary schools and sell the land. The evidence sufficiently supported the board's contention that the action was taken because of increased traffic and the commercialization of the area and not for racial reasons.[104]

Constitutional Issues

Not surprisingly, when cases concerning school buildings involve constitutional issues such as freedom of speech or due pro-

[100] McNeal v. Tate County School District, 460 F.2d 568 (5th Cir. 1972).
[101] *Id.* at 571.
[102] Taylor v. Coahama County School District, 345 F. Supp. 891 (N.D. Miss. 1972).
[103] *Id.* at 892.
[104] Ellis v. Board of Public Instruction, 465 F.2d 878 (5th Cir. 1972).

cess, the courts apply the same doctrines as those set forth in contemporary landmark decisions on constitutional issues. For instance, the clear and present danger test applied in *Lieberman v. Marshall,*[105] and other cases, *infra,* is a concept that was first propounded in dissenting and concurring opinions of Justices Holmes and Brandeis. The landmark cases that defined the doctrine of clear and present danger[106] were *Dennis v. United States,*[107] *Yates v. United States,*[108] *and Brandenburg v. Ohio.*[109]

Another pervasive doctrine in the area of freedom of speech is the notion of weighing state interests against a claimed constitutional right. For instance, in the recent case of *Grayned v. Rockford,* the Supreme Court held that, although school property may not be declared off limits for political activity, such activity may be prohibited if it materially disrupts classwork, involves substantial disorder, or infringes on the rights of others.[110]

Still another doctrine that runs through the First Amendment cases is that, once a public agency opens its doors to let organizations engage in activities, it may not discriminate as to who may use the premises merely on the basis of the content of those activities. A recent United States Supreme Court case, *Police Department v. Mosley,*[111] held that the state may not prohibit some kinds of speech discriminatorily without substantial justification. In *Mosley,* an ordinance permitted peaceful labor picketing near schools but forbade all other peaceful picketing. The Court held that this discrimination, based on content of expression and not on objective considerations of time, place, and manner, violated equal protection.

The following section reviews some recent and not-so-recent cases dealing with constitutional issues of freedom of speech, due process, freedom of assembly, equal protection, and freedom of religion involved in granting or denying use of school property to three kinds of nonstudent groups: subversive groups, teachers associations, and religious groups.

Use By Subversive Groups

A trilogy of California cases traces the attempts of the California Legislature to keep subversive groups from using school facili-

[105]Lieberman v. Marshall, 236 So. 2d 120 (Fla. 1970).
[106]A detailed discussion of the clear and present danger test as set forth in these and subsequent cases is beyond the purview of this paper. The subject has been discussed exhaustively in many treatises and law review articles.
[107]Dennis v. United States, 341 U.S. 494 (1951).
[108]Yates v. United States, 354 U.S. 298 (1957).
[109]Brandenburg v. Ohio, 395 U.S. 444 (1969).
[110]Grayned v. Rockford, 408 U.S. 104 (1972).
[111]Police Department v. Mosley, 408 U.S. 92 (1972).

ties for meetings. To do this, the legislature added sections to the California Civic Center Act (encountered earlier in *Ellis*[112]).

The first case, *Danskin v. San Diego Unified School District*, has subsequently been widely quoted as authoritative in many jurisdictions.[113] In *Danskin*, the California Supreme Court interpreted the California Civic Center Act and struck down part of it as unconstitutional. Section 19432 of that act, as it then stood, provided that:

> Any use, by any individual, society, group, or organization which has as its objective or as one of its objects, or is affiliated with any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State by force, violence or other unlawful means shall not be granted, permitted, or suffered.

The act went on to define a subversive person. In addition, persons applying for use of a school building could, under the act, be required by a board to file an affidavit. The affidavit gave evidence proving the applicants were not part of a subversive element, as defined in the act.

In *Danskin*, applicants for the use of a school auditorium, members of the San Diego Civil Liberties Committee, refused to comply with a local board resolution. Specifically, the board required them to sign an affidavit that stated, in part:

> I do not advocate and I am not affiliated with any organization which advocates or has as one of its objectives the overthrow of the present government of the United States or of any State by force or violence, or other unlawful means.

When the application was denied, the Civil Liberties Committee appealed to the Supreme Court of California for a writ, declaring parts of the Civic Center Act unconstitutional and directing the board to allow them the use of the auditorium.

The court, in reaching its decision, followed contemporary Supreme Court doctrine in applying a "clear and present danger" test to freedom of speech and of peaceable assembly, rights protected by the First Amendment of the United States Constitution. These freedoms are also protected against state action by the Fourteenth Amendment. The court ruled that to deny a person or organization

[112] Ellis, *supra* n. 36.
[113] Danskin v. San Diego Unified School District, 171 P.2d 885 (Cal. 1946).

these freedoms because of certain convictions or affiliations, the state first must show that the exercise of these freedoms presents a clear and present danger of bringing about substantive evils.

After reviewing a number of United States Supreme Court cases, the California court determined the governing principle was that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[114]

The court further noted that, prior to passage of the California Civic Center Act, the state was not required to open its school buildings for public use. Having opened its doors under the act, however, the state could not arbitrarily or discriminatorily prohibit certain persons from holding meetings.

The court ruled that, since the state cannot compel "subversive elements" directly to renounce their convictions and affiliations, it cannot make such renunciation a condition regulating the privilege of free assembly in the school building. Furthermore, since it is unconstitutional to prohibit these persons from exercising their rights of free speech and assembly, the court ruled it is also unconstitutional to require proof from persons and groups that they are not "subversive elements."

Following the *Danskin* decision, the California Legislature began revision of the unconstitutional sections of the Civic Center Act, trying to bring them within the limits set forth in *Danskin*. The new section, 16564, gave as a prohibited use "any use . . . for the commission of any act intended to further any program or movement, the purpose of which is to accomplish the overthrow of the government . . . by force, violence or other unlawful means. . . ." An accompanying section, like the one in *Danskin*, required an oath to the effect that the applicant organization does not advocate the violent or unlawful overthrow of the government and that the group is not a Communist action organization or a Communist "front" organization.

In *ACLU of Southern California v. Board of Education of City of Los Angeles*, in 1961, the California Supreme Court found that these revised sections suffered from the same basic defects as those the court had struck down in *Danskin*.[115] It was also apparent to the court that these sections had been drafted in an attempt to conform with post-*Danskin* decisions by the United States Supreme Court in the area of subversion and freedom of speech.[116]

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[114] *Id.* at 890.

[115] American Civil Liberties Union of Southern California v. Board of Education of City of Los Angeles, 359 P.2d 45 (Cal. 1961).

[116] Danskin, *supra* n. 113.

In particular, the school board in this second case relied on *Dennis v. United States,*[117] which they claimed relaxed the clear and present danger rule. The court, however, insisted that *Dennis* must be read in conjunction with *Yates v. United States,*[118] a case that distinguished, as had *Danskin,* between the advocacy of and the teaching of concrete action for the forcible overthrow of government (not protected by the First Amendment). General doctrinal advocacy, according to the court, was too far removed from concrete action to warrant restriction. The reference to the Communist party was also found to be unconstitutional since it directly restricted freedom of speech.

The third California case, *ACLU of Southern California v. Board of Education of City of Los Angeles,* in 1963, involved a school board rule designed to satisfy the *Danskin* case.[119] The crux of *Danskin* had been the required oath, aimed not at the use to which the property would be put, but at barring certain organizations from use because of their political beliefs. The statute obviously ignored the fact that such an organization might desire to use the property for a legitimate purpose.

In this third case, the Board of Education of the City of Los Angeles had issued a rule that stated:

> 1316. State of Information. Each person or group requesting the use of the premises for a Civic Center Activity shall as a condition for the issuance of the permit file the following statement:
>
> "The undersigned states that, to the best of his knowledge, the school property for the use of which application is hereby made will not be used for the commission of any act which is prohibited by law, or for the commission of any crime including, but not limited to, the crime specified in Sections 11400 and 11401 of the California Penal Code. I certify (or declare) under penalty of perjury that the foregoing is true and correct."

The Southern California American Civil Liberties Union, like the San Diego ACLU in *Danskin,* refused to sign this statement to obtain the use of school facilities. They claimed that it constituted prior censorship and prior restraint on free speech, which was not justified by a clear and present danger.

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117 Dennis, *supra* n. 107.
118 Yates *supra* n. 108.
119 American Civil Liberties Union of Southern California v. Board of Education of City of Los Angeles, 379 P.2d 4 (Cal. 1963).

The California Supreme Court disagreed that this rule was a prior restraint, since it did not require a person to submit what would be spoken or demonstrated ahead of time. Rather, the court maintained, the statement required only self-censorship. Furthermore, the court found that some types of prior restraint are legitimate, such as requiring that some movies be reviewed ahead of time.

The court concluded that this rule had a legitimate purpose, was not directed at limiting freedom of speech, and focused on the use to which the facilities were to be put, rather than on the nature of an organization. In upholding the rule, the court observed further that the rule did not require applicants to disclose their qualifications, beliefs, or past activities. The court concluded, therefore, the rule did not subvert presumptions of innocence or invert the burden of proof. Nor was the rule too vague, broad, arbitrary, or unreasonable, in the court's view.

The notion that, once an institution opens its doors to the public, it cannot discriminate among groups on the basis of political beliefs has been expressed in many cases. In an earlier case, *Ellis v. Dixon,* however, the United States Supreme Court refused in 1955 to overturn a New York City board's decision to deny a permit to the Yonkers Committee for Peace (YCP).[120] The president of the YCP brought an action to compel the local board of education to permit his organization to hold a forum in a local schoolhouse. The YCP charged that the board had allowed unspecified organizations to use the school building for public assemblies and discussions.

The Court, in a very brief opinion, refused to hear the case, describing the allegations as "too vague" to permit adjudication of the constitutional issues. The Court ruled that the plaintiffs would have to allege that the board had permitted similar organizations to use the school property for similar purposes in order to properly raise the question of constitutionality.

In a successor case two years later, the same committee brought a petition to review the commissioner of education's denial of school facilities to the YCP.[121] This time, petitioners had placed advertisements in Communist publications, and they had refined their arguments since their attempt to get a hearing before the Supreme Court.

The board claimed the YCP would have to charge that the other organizations using school facilities had also caused strife and dissension in the community, in order for the YCP to be considered in

[120]Ellis v. Dixon, 349 U.S. 458 (1955).
[121]Ellis v. Allen, 165 N.Y.S. 625 (1957).

the same "class" as these groups. The New York court disagreed, ruling a school board cannot discriminate against an organization merely because it or part of the public was hostile to the organization.

The court further held that, to bar such a group, the board would have to provide fair proof of a clear and present danger, and that public disorder and possible damage to school property would result from the proposed use.

East Meadow Concerts Association v. Board of Education of Union Free School District No. 3, County of Nassau is a more recent case.[122] The concert association had made use of the East Meadow, Long Island, high school auditorium for ten years. In June 1965, following its usual procedure, it gave the school its list of upcoming concerts, and the school gave permission to hold them.

Later, however, the school withdrew permission to use its facilities for a concert because it featured folk singer Pete Seeger. The board spoke critically of Seeger's recent trip to Moscow and his singing songs critical of American policy in Vietnam. Because of Seeger's "highly controversial" stature, the board said, there was a danger that his presence at a concert might provoke a disturbance. In the board's view, such a disturbance could result in damage to school property.

The court found that the state does not have a duty to make school buildings available for public gatherings, but if it did so, it must continue to do so impartially. Once its doors were so opened, the state was bound by the restriction implied in the United States Constitution, article I, section 11. The court also observed that the expression of controversial and unpopular views is precisely what is protected by federal and state constitutions. To exercise prior restraint on expression, according to the court, the board must demonstrate on the record that such expression, without itself being lawful, would "immediately and irreparably create injury to the public weal."

In *Lieberman v. Marshall*, a Florida court found such grounds.[123] That case involved an appeal to dissolve a temporary injunction against members of Students for a Democratic Society (SDS). The injunction had enjoined them from holding meetings or rallies in buildings at Florida State University.

The court determined that, under the clear and present danger test, a college, university, or public school may deny a campus

[122]East Meadow Concerts Association v. Board of Education of Union Free School District No. 3, County of Nassau, 219 N.E.2d 172 (N.Y. 1966).
[123]Lieberman, *supra* n. 105.

group access to a building if it appears that the group, in using the building, would advocate or attempt:

> (1) Violent overthrow of the Government of the United States, the State of Florida, or any political subdivision thereof;
> (2) Willful destruction or seizure of the institution's buildings or other property;
> (3) Disruption or impairment by force of the institution's regularly scheduled classes or other educational function;
> (4) Physical harm, coercion, intimidation or other invasion of lawful rights of the institution's officials, faculty members or students; or
> (5) Other campus disorders of a violent nature.[124]

The issues in this case centered first on whether the injunction was legally sufficient at the time it was issued, and second, whether SDS members had a constitutional right to use the Florida Room in the University Union, regardless of university rules or decisions.

The university only permitted recognized organizations to use its facilities, and it had not officially recognized SDS. In addition, the university charged that the sole purpose of the requested meeting was to force a confrontation with the university.

In examining the injunction, the court acknowledged that the SDS members had not been given notice or hearing before the injunction was issued. The court ruled, however, that although normally such an injunction would be invalid, it was valid here because there was no time to notify SDS: the injunction was issued while the meeting was taking place and property damage was imminent, according to the court.

School authorities were not required to go to court at the earliest possible moment to secure an injunction, the court decided. The time customarily devoted to giving notice or allowing hearings had been taken up in alleged negotiation between the university and SDS. Because of the supposed imminence of violence, injury, and damage, the court ruled the lack of notice was justified, though there was some question later whether the negotiations had actually taken place.

Although the court went through an extensive review of freedom of speech cases including *Danskin*,[125] *Tinker v. Des Moines Independent Community School District*,[126] and *Brooks v. Auburn Uni-*

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124 *Id.* at 123.
125 Danskin, *supra* n. 113.
126 Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

versity,[127] it concluded the facts showed that SDS was trying to provoke a confrontation with the university by occupying the room. The court stated:

> The State and its citizens through their University and public school officials have a valid interest in the orderly, peaceful, and nondisruptive operation of the University system. . . . Restraint may be imposed where necessary, to preserve the safety and order of the campus community and prevent interference with pursuit of educational objectives; behavior susceptible of such restraint includes seizure of a portion of a campus building, and conduct which may without exaggeration be termed disruptive, contemptuous, defiant, highly visible and provocative, intended to bring about a confrontation, and carrying with it the virus of violence.[128]

Using a balancing test, the court concluded:

> When the interest of SDS members in seizing a portion of a campus building in open defiance of known University regulations is balanced against the need of the University to maintain order and respect for fair rules, and its need to pursue educational goals without undue disturbance, it is apparent that the equities clearly lie with the University and that the activities of SDS and its members fell beyond the limits of protected speech under our State constitution.[129]

Use By Teachers Associations

Constitutional issues have been raised in some recent cases involving the rights of teachers associations to use school facilities. A Florida court was one of the first courts to face the issue. The case of *Dade County Classroom Teachers Association v. Ryan* involved the struggle of a teachers association to become the sole bargaining agent of a school. The appeals court said that statutes did not permit a union to be sole bargaining agent unless all the teachers had agreed to let it act as their agent.[130]

As a sidelight to the case, the court allowed the use of school facilities by unions, but warned that no exclusive right to use of the facilities could be granted. The court held:

> We see no objection to the School Board allowing the In-

[127] Brooks v. Auburn University, 296 F. Supp. 188 (D.D.C. 1969).
[128] Lieberman, *supra* n. 105 at 126.
[129] *Id.* at 128.
[130] Dade County Classroom Teachers Association, Inc. v. Ryan, 225 So. 2d 903 (Fla. 1969).

tervenor the use of interschool mail facilities or bulletin board space, or furnishing it teacher lists and giving the right to hold meetings on school property to Intervenor and its members, so long as the same privileges are afforded all teachers or their collective bargaining organizations not aligned with Intervenor; always provided any of such privileges or considerations are subject to cancellation by the School Board at any time in its sound and sole discretion.[131]

Although the court did not specifically cite constitutional principles, it implicitly accepted the principle against discrimination. It is possible, however, that, if state statutes allowed exclusive bargaining agents, this court would have granted exclusive rights to use school facilities.

Two cases have disagreed with *Dade*. In a Colorado case, *Local 858 of American Federation of Teachers v. School District No. 1*,[132] the AFT local, which lost the representative election, sued the school district. In its suit, the AFT local claimed the school district's refusal to let the union use certain facilities violated the constitutional rights of the union and its members. The union that was successful in the representation election, the Denver Classroom Teachers Association (DCTA), intervened, officially coming into the suit as part of the plaintiff's case.

The specific actions that the AFT claimed were illegal were (1) denying the AFT use of school buildings for meetings, free of charge; (2) denying the AFT use of school bulletin boards, except during election campaigns; (3) denying AFT use of teachers' mailboxes, except during election campaigns, and (4) denying AFT the right to have dues deducted from teachers' salaries. The district had made these denials of use pursuant to a bargaining agreement between the school district and DCTA.

Both sides made motions for summary judgment, leaving the decision with the court on whether the exclusive privileges granted to DCTA denied the plaintiffs their First Amendment rights or their Fourteenth Amendment right of equal protection of the law.

On the First Amendment issue, the court could find no precedent case that was pertinent. Because of this, the court was forced to look at the broad constitutional principles governing First Amendment rights.

The plaintiffs had alleged only that the issue was a broad restric-

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131 *Id.* at 907.

132 Local 858 of American Federation of Teachers v. School District No. 1, 314 F. Supp. 1069 (D. Colo. 1970).

tion on free speech. The court, however, refused to accept this broad scope and sought to narrow the issue. It held that the case presented a problem of labor relations, even though it was in a public context. The question then, for the court, was whether or not granting exclusive privileges impaired the right of non-DCTA members to organize and form unions. If there was such an impairment, there would be a violation of the First Amendment.

In delivering its decision, the court cited *N.L.R.B. v. Jones & Laughlin Steel Corp.*[133] for the proposition that an employer may grant to an elected collective bargaining agent certain exclusive contract rights. The court found no reason not to extend this doctrine to the public sector.

The court then turned to the alleged impairment of freedom of association:

> Our issue is freedom of association. This is a First Amendment freedom which may be impaired by State action when the State can show a compelling interest which, when balanced against the substantive right to be protected, outweighs that right. . . . The grant of exclusive privileges to one of two competing unions after that union has won a representation election serves several interests. It allows the effective exercise of the right to form and join unions in the context of public employment. It provides the duly elected representative ready means of communicating with all teachers, not just DCTA membership. This is essential, since DCTA represents *all* teachers not just its membership. It eliminates inter-union competition for membership within public schools except at time of representation elections. This has several salutary aspects. Orderly functioning of the schools as education institutions is insured through the limiting of the time span when they may become a labor battlefield. . . . Finally all of these benefits resulting from the grant of exclusive privileges to the elected representative serve the principal policy of ensuring labor peace in public school. . . . Labor peace . . . means a lowered incidence of labor conflict and strife, thus insuring less interference with the functioning of the public schools as educational institutions.
>
> Against these interests we must balance the limited interference with plaintiffs' right to associate. The interference is that they are not granted equal access to internal channels of communication nor are they granted a check-off.[134]

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[133] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[134] Local 858, *supra* n. 132 at 1076.

In examining the equal protection issue, the court found no discrimination against Denver teachers based on the union to which they belonged. However, for the sake of fully disposing of the constitutional issues, the court assumed such a distinction existed. The court examined the "compelling State interest" test in this light and found that the same reasoning had been used to determine the First Amendment issue applied to equal protection. The court again balanced a "compelling State interest" in labor tranquillity within public education against a negligible impairment to the plaintiffs, Local 858 of the American Federation of Teachers and the Denver Classroom Teachers Association.

A Delaware case reinforced the Denver decision. The court found, in this case, that the school board had the right to grant exclusive use of school facilities to one teachers association and to exclude all other teachers organizations.[135] The court held that the exclusion of others served to promote "a compelling State interest," namely, the protection of school buildings and grounds from becoming "labor battlefields."

The union that had been denied access, the Federation of Delaware Teachers (FDT), claimed that it had been denied its statutory rights to organize. The FDT accused the school board of denying it the right to equal treatment regarding access to public school employees. Specifically, the union charged that it was denied use of interschool mail facilities, bulletin board space, use of teachers lounges, and permission to hold meetings on school property.

The court dismissed the allegations, saying there was no evidence that the FDT had been denied access to public school employees. Nor, the court noted, had the FDT applied for use of buildings for meetings. In examining the use of bulletin boards and mails, the court favorably noted and quoted extensively from *Local 858*.[136]

An Islip, New York, board claimed the right to limit the use of school mailboxes to "routine internal distribution" of materials. A teachers association that had signed a collective bargaining agreement with the board distributed copies of their official publication through faculty mailboxes and elsewhere in school areas. When the board enforced their rule forbidding this type of action, the association brought action for declaratory and injunctive relief. The court ruled in favor of the plaintiff, holding that fear that distribution of materials in schools might lead to disruption

[135]Federation of Delaware Teachers v. De La Warr Board of Education, 335 F. Supp. 386 (D. Del. 1971).
[136]Local 858, *supra* n. 132.

was not enough to justify such a broad restriction of teachers' First Amendment rights.[137]

Use by Religious Groups

Older cases, as might be expected, either gave a much narrower interpretation to freedom of speech or ignored it altogether. An Ohio court ruled in 1949 that a board acted constitutionally and within the scope of its authority when it refused the use of a school to a religious group.[138] This group, the Jehovah's Witnesses, sought a writ directing the board to allow them to use the school building.

According to the group, they had applied for permission to use the school auditorium on Sundays to hold public meetings "where lectures were to be given" concerning the Bible and the purposes of Almighty God; that the lectures would be free, nonexclusive, open to the public for educational purposes and for the welfare of the community."[139]

The board claimed that the vast majority of the community was against the use and believed that permitting such use would be tantamount to supporting a place of worship in violation of statutes. Another factor in the case was that the applicants were not citizens of the district, and statutes required that they be so.

The Jehovah's Witnesses relied on state statutes that read:

> Upon application of any responsible organization or of a group of at least seven citizens, all school grounds and schoolhouses . . . shall be available for use as social centers for the entertainment and education of the people, including the adult and youthful population, and for discussion of all topics tending to the development of personal character and of civic welfare, and for religious exercises.
> The board shall, upon request and the payment of a reasonable fee . . . permit the use of any schoolhouse and rooms therein . . . when not in actual use for school purposes and for any of the following purposes:
> For holding educational, religious, civic, social or recreational meetings and entertainments, and for such other purposes as may make for the welfare of the community.[140]

The Jehovah's Witnesses argued that these statutes placed a ministerial duty on the board to allow religious groups to use school

[137] Friedman v. Union Free School District No. 7, Town of Islip, 314 F. Supp. 223 (E.D. N.Y. 1970).
[138] Greisinger v. Grand Rapids Board of Education, 100 N.E.2d 294 (Ohio 1949).
[139] *Id.* at 296.
[140] *Id.* at 297.

property. The group maintained that the statutes left them no discretion. The court disagreed and gave a very broad interpretation of board discretion. Upholding the board's refusal, the court considered the constitutional issues very briefly but dismissed them as being of no consequence.

Use of school property by religious groups has been challenged in the past on the grounds that it violates the establishment clause of the First Amendment. Recent court rulings on church-state separation and aid to parochial schools are more likely to affect use of school facilities during school hours than after school hours, though this is not perfectly clear.

In *Illinois ex rel. McCollum v. Board of Education of School District No. 71,*[141] the United States Supreme Court addressed itself to one facet of religious instruction during school hours. In that case the board of education, exercising its powers to supervise the use of public school buildings, allowed religious teachers to come to the school to give religious instruction during school hours to children whose parents requested this training. While these students were receiving their religious training, the other students remained in their normal classes.

The Court found that the use of tax-supported property for religious instruction and the close cooperation between school authorities and religious groups violated the Establishment Clause of the First Amendment. The principal evil of the system, according to the Court, was the partial release from compulsory education for children attending religious classes. It did not matter, said the Court, that the school was not showing any preference for a particular religion.

A Florida case dealt with the issue of after-school use of school property by religious groups.[142] In that case, several churches were allowed the use of school buildings pending the completion of their own buildings. The plaintiff charged that this violated both the state constitution and the establishment clause of the First Amendment of the Constitution.

The Florida Constitution provided that no preference was to be given to any church, sect, or mode of worship, nor were funds of the public treasury to be contributed directly or indirectly to such groups.

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[141] Illinois *ex. rel.* McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, 333 U.S. 203 (1948).

[142] Southside Estates Baptist Church v. Board of Trustees, School Tax District No. 1 in and for Duval County, Florida, 115 So. 2d 697 (Fla. 1959).

The relevant Florida statute provides that:

> Subject to law, the trustees of any district may provide for or permit the use of school buildings and grounds within the district, out of school hours during the term, or during vacation, for any legal assembly, or as community playcenters, or may permit the same to be used as voting places in any primary, regular, or special election.

The court in this case found no direct or indirect contribution of public funds in aid of any religious denomination. The plaintiff had charged that use of buildings constituted a contribution, but the court found this to be de minimis.

According to the court, the criteria for judging the permissibility of religious services in after-school hours depend on state legislation. In this case, the court thought that the board was acting within its permissible scope of authority granted to it by the words "for any legal assembly."

The court did not find a violation of the establishment clause, but warned that if the use by a church were prolonged to the extent of approaching permanency or if the board showed preference toward one denomination or sect, there might be a violation.

IV. CONCLUSION

As public use of school property increases, legal questions concerning control and regulation of its use can also be expected to arise with increasing frequency. Litigation, however, probably will not expand uniformly in all areas of law relating to the use of school property. There are areas of the law which are fairly well settled and in which relatively little litigation may be expected. These areas include the extent of board discretion, the uses to which school buildings may be put—for example, concerts, lectures, and dancing—and, to a large extent, tort liability. Increases in litigation are most likely to occur in the constitutional areas of freedom of speech and equal protection.

The legal principles illustrated in the cases and statutes relating to use and disposition of school property do not form a unique area of the law. Rather, they include many areas of law that are common to other administrative concerns. The broad subject of board discretion, for instance, relates to many aspects of administrative decision-making besides the control of school property. The concepts of freedom of speech and tort liability extend well beyond the issues relating to school facilities. It is in the application of

these broad principles to the school property issues that unique problems arise.

An administrator considering whether to grant or deny use of school property to a person or group on grounds that might affect their constitutional rights should be aware of the considerations outlined in the preceding discussion of cases.

The rights of teachers associations that are not recognized as bargaining agents to use school facilities are still not entirely clear. It is possible that this issue might need to be resolved by the Supreme Court if conflict between district court decisions develops. In many cases, however, the decision will depend on interpretations of state statutes.

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